Hastings Communications and Entertainment Law Journal

Volume 4 | Number 4 Article 8

1-1-1982

Employee and Independent Contractors: Legal Implications of Conversion from One to the Other

Allan L. Bioff

Robert E. Paul

Employee and Independent Contractors: Legal Implications of Conversion from One to the Other

By ALLAN L. BIOFF*
ROBERT E. PAUL**

I
Introduction

The question of whether an individual performing services for another is an "employee" or an "independent contractor" most often arises in determining whether the individual is or is not covered by and entitled to the protections of various labor statutes. For example, employees (in general) are covered by and entitled to the protections of the minimum wage and overtime provisions of the Fair Labor Standards Act[1]—independent contractors are not. Employees are covered by and entitled to the protections of the National Labor Relations Act[2]—independent contractors are not. Employees are covered by and are entitled to the protections of federal and state equal employment opportunity statutes[3]—independent contractors are not. Indeed, from an employer's point of view, the major advantage in having services performed by "independent contractors" is the avoidance of restrictions and obligations which are imposed by labor legislation when an employer-employee relationship exists.[4] From a union's standpoint, on the other hand, "employee" status is necessary to provide workers

* B.S. Northwestern University; J.D. University of Michigan. Partner, Watson, Ess, Marshall & Enggas, Kansas City, Missouri.

** B.A., Case Western Reserve University, 1967; J.D., George Washington University, 1971. President of Eisenberg & Paul, Arlington, Virginia.

1. 29 U.S.C. §§ 201-219 (1976).

2. 29 U.S.C. §§ 141-187 (1976).

3. *See* 5 U.S.C. §§ 5108-5115 (1976); 42 U.S.C. §§ 2000e-2000e-17. *See also* California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12940-12948 (West 1980).

4. The independent contractor, though not covered by labor legislation as an "employee," may be covered under such legislation as an "employer" if he utilizes employees to assist him in fulfilling his contractual functions.

with the full array of protections enacted by Congress and state legislatures.

In the field of media labor relations, issues turning on the distinction between independent contractor status and employee status have arisen frequently in the area of newspaper distribution. The status of individuals who perform work in the editorial or some other commercial department of newspapers and efforts by unions to protect their jurisdiction when work is assigned to alleged independent contractors have also given rise to considerable litigation.

From the unions' perspective, the expanding use of so-called freelancers[5] calls for determined and possibly innovative approaches to prevent a loss of jurisdiction and to insure that employees receive all of the rights and benefits mandated by Congress.

This article will first examine the shift in the newspaper industry from independent contractor distribution to in-house or delivery agent distribution and the labor law side effects caused by this shift. Then it will consider both union and management perspectives on the issue of the expanding use of independent contractors in the communications field. Finally, the article will discuss the decisions of the National Labor Relations Board which have identified the factors to consider in determining whether a freelancer is an employee or an independent contractor, and the jurisdictional problems relating to the issue of using independent contractors in the communications field.

II

A. The Shift from Independent Contractor Distribution to In-House or Delivery Agent Distribution

Prior to the 1970's, many, if not most, metropolitan newspaper publishers distributed newspapers by selling them at wholesale to independent distributors (sometimes called contract carriers) who in turn resold and delivered them to subscribers. One of the primary motivations for using independent distributors—as opposed to using employees to distribute the newspaper—was to avoid unionization of persons engaged in distribution. As earlier indicated, independ-

5. Freelancers are individuals who contract with an employer on a project-by-project basis.

ent contracts are not covered by the National Labor Relations Act and cannot, therefore, compel collective bargaining.[6]

In 1968, however, the United States Supreme Court, in the case of *Albrecht v. Herald Co.*,[7] held that it is a per se violation of section 1 of the Sherman Antitrust Act for a newspaper publisher to fix and enforce the maximum price at which its independent distributors could resell the newspaper.[8] In *Albrecht*, the *St. Louis Globe Democrat* distributed its morning newspaper through independent carriers who bought the newspapers at wholesale from the publisher and then sold them at retail to subscribers. The independent carriers each had an exclusive territorial arrangement which was terminable if the carrier exceeded the maximum retail price advertised by the publisher. The plaintiff, Albrecht, was one of the independent carriers. When he exceeded the suggested maximum retail price, the publisher employed an agency to solicit Albrecht's customers and began to deliver the paper to Albrecht's customers at the lower suggested retail price. Later, the publisher turned over to another carrier Albrecht's customers who it had succeeded in obtaining and informed Albrecht his territory would be returned to him only if he adhered to the suggested retail price. When Albrecht responded by filing suit charging a combination in restraint of trade in violation of section 1 of the Sherman Act, the publisher terminated his contract as a carrier.

A jury returned a verdict in favor of the *Globe Democrat*. On appeal from the district court's denial of plaintiff's motion for judgment notwithstanding the verdict, the Court of Appeals for the Eighth Circuit affirmed, holding that the *Globe Democrat*'s conduct was wholly unilateral and not in restraint of trade.[9] The Supreme Court reversed.[10] The Court concluded that the uncontroverted facts showed a combination within the mean-

6. Sometimes a publisher believes his "independent distributors" are independent contractors within the meaning of the law only to learn from the National Labor Relations Board that his distributors are, in fact, employees covered by the National Labor Relations Act and hence are entitled to organize and bargain collectively. This result occurs if the publisher fails to relinquish a sufficient degree of control over the means and methods of accomplishing the distribution function so as to establish a bona fide independent contractor relationship. *See, e.g.*, Buffalo-Courier Express, Inc., 129 N.L.R.B. 112 (1960); Drukker Communications, Inc., 258 N.L.R.B. 97 (1981).

7. 258 N.L.R.B. 97 (1981).

8. *Id.* at 153.

9. *Id.* at 148-149.

10. *Id.*

ing of section 1 of the Sherman Act between the *Globe Democrat*, the agency hired by the *Globe Democrat* to solicit Albrecht's customers and the other contract carrier to whom the *Globe Democrat* subsequently turned over Albrecht's customers.[11] The Court further concluded that combinations or agreements "to fix maximum prices, 'no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' "[12]

The practical effect of the Supreme Court's holding in *Albrecht* is that individual contract distributors of newspapers[13] cannot be required by the publisher to maintain a maximum retail price and hence are free to charge whatever retail price they wish. By charging a price higher than the optimum price determined by the publisher to be the price necessary to maximize circulation and advertising revenues, a distributor could lower a publisher's circulation and consequently advertising revenues could also decline.[14] Indeed, Justice Harlan in his separate dissenting opinion in *Albrecht*, concluded: "Today's decision leaves respondent [*The Globe Democrat*] with no alternative but to use its own trucks."[15]

Following *Albrecht*, many publishers of daily newspapers did conclude that they, in fact, had no alternative but to "use their own trucks" for distribution—or at least to change their distribution system in such a way as to be able lawfully to control

---

11. *Id.* at 150.

12. The majority opinion in *Albrecht* cited Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) for the proposition that vertical maximum price fixing is illegal per se under the Sherman Act. *Kiefer-Stewart*, however, can be read as outlawing a horizontal combination of manufacturers to impose on retailers a maximum retail price. Both *Albrecht* and *Kiefer-Stewart* have been widely criticized. *See, e.g.*, Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 DUKE L.J. 645, 665-8. The Supreme Court's recent grant of certiorari in Arizona v. Maricopa County Medical Society, 643 F.2d 553 (9th Cir. 1980), *cert. granted*, — U.S. —, 101 S. Ct. 1512 (1981) may give the Court an opportunity to reexamine the issue of maximum price fixing.

13. Individual contract distributors generally have exclusive territories and therefore are not subject to price competition from other carriers.

14. As pointed out by Justice Stewart in his separate dissenting opinion in *Albrecht*:

> Because the major portion of the respondent's income derives from advertising rather than from sales to distributors, the respondent's [*The Globe Democrat's*] self-interest is in keeping the retail price of the paper low in order to increase circulation and thereby increase advertising revenues.

390 U.S. at 169 n.2.

15. *Id.* at 168.

the retail price of their newspapers.[16] Some publishers terminated their arrangement with their independent distributors and began using their own employees to sell and distribute their newspapers to the subscribers.[17] Other publishers, having terminated their contracts with their independent distributors, began selling the newspapers directly to the subscribers and used independent delivery agents (in some cases the same persons who were formerly the independent distributors) to deliver the newspapers.[18] Still other publishers made little or no substantive change in their distribution systems, simply concluding that the individuals who were distributing their newspapers and whom the publishers had earlier labeled "independent contractors" were, in fact, "employees."[19]

The change in the newspaper distribution system by the publisher from selling the newspaper to distributors at wholesale to directly selling to the subscriber has resulted in a number of antitrust actions by terminated distributors.[20] These antitrust challenges to the elimination of independent distributors and the forward integration by publishers into sales and distribution have been largely unsuccessful to date.[21]

16. An additional problem for newspaper publishers raised by the *Albrecht* decision was the suggestion in the majority opinion that the exclusive territorial arrangement between the *Globe-Democrat* and its independent distributors might also be illegal under the Sherman Act, citing United States v. Arnold, Schwinn and Co., 399 U.S. 365 (1967). At least one Court of Appeals subsequently interpreted *Albrecht* as standing for the proposition that exclusive territorial arrangements between a newspaper publisher and independent contract distributors are illegal per se under section 1 of the Sherman Act. Noble v. McClatchy Newspapers, 533 F.2d 1081 (9th Cir. 1975). In 1977, however, the Supreme Court in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), overruled the per se rule enunciated in *Schwinn* and held that vertical territorial restrictions would henceforth be judged under the traditional rule of reason standard. Following the *Sylvania* decisions, the lower courts have upheld exclusive territorial arrangements between newspaper publishers and contract distributors. *See, e.g.*, Newberry v. Washington Post, 438 F. Supp. 470 (D.D.C. 1977).

17. *See, e.g.*, Lamarca v. Miami Herald Publishing, 395 F. Supp. 324 (S.D. Fla.), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975); Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D. Cal. 1974), *aff'd*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

18. *See, e.g.*, Harden v. Houston Chronicle Publishing Co., 434 F. Supp. 54 (S.D. Tex. 1977), *aff'd mem.*, 572 F.2d 1106 (5th Cir. 1978); Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977).

19. *See, e.g.*, Oakland Press, 249 N.L.R.B. 1081 (1980) (supplementing 229 N.L.R.B. 476 (1977)); The Virginian-Pilot/Ledger Star, 241 N.L.R.B. 575 (1979).

20. *See, e.g.*, Auburn News Co. v. Providence Journal Co., 956 F.2d 273 (1st Cir. 1981); Paschall v. Kansas City Star Co., 441 F. Supp. 349 (W.D. Mo. 1977); Harden v. Houston Chronicle Publishing Co., 434 F. Supp. 54 (S.D. Tex. 1977); Newberry v. Washington Post, 438 F. Supp. 470 (D.D.C. 1977); Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D. Cal. 1974).

21. In fact, the only reported case in which terminated independent newspaper

B. Labor Law "Side Effects" from the Shift from Independent Contractor Newspaper Distribution to Employee Distribution

While the publisher's primary motivation for abolishing wholesale selling of newspapers to independent distributors and engaging in direct retail sales to subscribers has been to obtain and exercise control over retail pricing without violating the antitrust laws, a labor relations side effect has resulted in some cases—a side effect beneficial from the publisher's point of view. That side effect has been the removal of so-called "district managers"[22] from the coverage of the National Labor Relations Act, thus eliminating the publisher's obligation to bargain collectively over the district manager's wages, hours and working conditions.[23]

The *Oakland Press* case illustrates how the change from independent newspaper distribution to employee distribution can result in the removal of district managers from the coverage of the National Labor Relations Act. The *Oakland Press*, a daily newspaper, is distributed to city subscribers by about 1,250 city carriers whose ages range from eleven to fourteen years, and to suburban subscribers by about thirty-five or forty adult motor route suburban carriers. The city and suburban carriers are directly responsible to one of fifteen district managers. The carriers are hired by a district manager to make house-to-house deliveries within a prescribed area. Both city and suburban carriers are required to sign a document entitled "The Oakland Press Independent Carriers Route Agreement," which provides, among other things, for an exclusive territory in which the carrier has the right to service all subscribers; that the carrier may not deliver any other newspaper or printed material not authorized by the publisher; that the carrier must sell the newspaper to the subscriber "at the established rate;" and that either party may terminate the agreement without cause upon thirty days' notice.[24]

---

distributors have achieved any success in challenging the termination of their distribution arrangements has been Paschall v. Kansas City Star, 441 F. Supp. 349 (W.D. Mo. 1977). The District Court's injunction prohibiting the *Star* from terminating its distributor contracts is presently on appeal to the Eighth Circuit. Paschall v. Kansas City Star Co., No. 81-1963 (8th Cir. 1982).

22. Or other persons who supervise newspaper carriers.

23. *See* Oakland Press Company, 249 N.L.R.B. 1081 (1980) (supplementing 229 N.L.R.B. 476 (1977)); The Virginian/Oukit Ledger Star, 241 N.L.R.B. 575 (1979).

24. 249 N.L.R.B. at 1081.

Pursuant to the terms of the independent carriers' route agreement, the city and suburban carriers sell the newspapers to subscribers on their route at the retail price set by the publisher.[25] In those situations where there are too few subscribers to permit reasonable earnings by the carrier, the publisher provides the carrier with a bonus, thus subsidizing the route.[26]

The carriers have no proprietary interest in their routes, that is, they may not sell their routes nor buy others. Carriers need not post a bond nor pay for the subscriber list. The publisher does not withhold social security and income taxes on behalf of the carriers, nor does he provide workmen's compensation for the carriers or grant carriers any of the fringe benefits which are provided to the publisher's employees.[27]

In 1970, when the Teamsters Union petitioned the National Labor Relations Board to represent the district managers, the publisher claimed that the unit was inappropriate because both the district managers and the carriers were independent contractors.[28] The National Labor Relations Board held that the district managers were an appropriate unit and the Teamsters Union was certified as their bargaining agent. Subsequently a collective bargaining agreement was entered into between the *Oakland Press* and the Teamsters covering the district managers.

In 1976, when the labor agreement between the publisher and the Teamsters expired, the publisher refused to bargain with the Teamsters, alleging that the district managers were "supervisors" within the meaning of the National Labor Relations Act. Under the Act, a person is a supervisor only if he supervises "employees" of the employer. Section 2(11) of the National Labor Relations Act defines a supervisor as any person:

> [h]aving authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline *other employees*, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if . . . such authority is not of a merely routine or clerical nature, but requires the use of independent

25. This price is usually about 4¢ to 6¢ higher than the wholesale price at which the carrier purchases the newspaper from the publisher.

26. 249 N.L.R.B. at 1081.

27. 249 N.L.R.B. at 1082, 1083.

28. 249 N.L.R.B. at 1083 n.11.

judgment.[29]

Thus, the issue whether the district managers were "supervisors" depended on whether the relationship of the carriers to the publisher was that of independent contractor or that of employee.

The publisher claimed that the carriers were "employees" within the meaning of the Act, and that the district managers were therefore supervisors within the meaning of the Act. The position taken by the publisher that the carriers were "employees" and not independent contractors was contrary to the position it took earlier in 1970.

The Teamsters Union initiated unfair labor practice proceedings. The union and the NLRB General Counsel contended the publisher was legally required to bargain over the working conditions of the district managers because, in their view, the city and suburban carriers were "independent contractors" and consequently the district managers, even though they directed and exercised control over the carriers, were not "supervisors" within the meaning of the National Labor Relations Act.[30]

An administrative law judge heard the case and concluded that the carriers were not employees of the publisher, that the district managers were therefore not "supervisors," and that the *Oakland Press* was therefore obligated to bargain with the Teamsters over the district managers' working conditions.[31] However, the administrative law judge declined to decide whether the carriers, even though not employees, were "actually independent contractors." After the Board adopted the administrative law judge's recommended decision holding that the publisher had violated the Act by refusing to bargain with the Teamsters as the representative of the district managers, the publisher petitioned the Court of Appeals for the Sixth Circuit to review the Board's decision. The Sixth Circuit remanded the case to the Board for a determination of whether the carriers were employees or independent contractors, stating that the carriers "were entitled to be definitely classified under the statute."[32]

---

29. 29 U.S.C. § 152(11) (1976) (emphasis added).

30. *Id.* The individual must possess supervisory authority over "employees" who report to him. If the persons who report to the individual are "independent contractors" and not "employees," the individual is not a "supervisor" within the meaning of the Act.

31. Oakland Press Co., 229 N.L.R.B. 476 (1977).

32. Oakland Press Co. v. NLRB, 606 F.2d 689 (6th Cir. 1979).

On remand, the National Labor Relations Board reversed its earlier decision and held that the carriers were in fact "employees" of the publisher within the meaning of the Act and that consequently the district managers were supervisors excluded from the coverage of the Act. The publisher therefore had no duty to bargain with the Teamsters over the wages, hours and working conditions of the district managers.[33]

In reversing its earlier decision, the Board relied principally on the following indicia of employer-employee relationship:

1. The publisher establishes the wholesale and resale price of the newspaper, thereby controlling to a great extent the carrier's income.
2. The opportunity for additional income through the carrier's efforts in securing new subscribers is limited because of his limited territorial rights.
3. The carriers are prohibited from handling any other newspapers or printed material without authorization by the publisher.
4. The publisher has the unilateral right to change the size of the carriers' route.
5. The carriers have no proprietary interest in their route.
6. The carriers do not have to pay the publisher for copies of the newspaper that are damaged or lost for any reason.
7. The publisher finances promotional campaigns and the district managers have substantial control over the carriers in their day-to-day performance.[34]

Board member Truesdale dissented, stating, among other things:

> Until recently, Respondent [*Oakland Press*] maintained that the carriers were independent contractors. Its present position, as announced at the hearing in this matter, is that newspaper carriers are employees. However, the record evidence, including Respondent's past characterization of its business relationship with the carriers, belies its present position. Thus, Respondent's current agreement governing its relationship with the carriers refers to the carrier as an "independent carrier." Also Respondent's insurance policy specifically uses the legal term "independent contractor" in referring to the carrier. While these facts are not alone controlling, they do manifest Respondent's intention to avoid creating an employer-employee relationship with the newspaper carriers.[35]

---

33. Oakland Press Co., 249 N.L.R.B. 1081 (1980).
34. *Id.* at 1083.
35. 249 N.L.R.B. at 1083-1084.

In his dissent, Member Truesdale also observed that the carriers, unlike the publisher's regular employees, were not on the publisher's payroll and received none of the benefits accorded to regular employees. The carriers' compensation consisted not of wages or salary but was based upon the difference between the wholesale price of the newspaper and the amount collected from customers at the retail price. Furthermore, carriers differed from employees of the publisher because they signed an independent carrier agreement. Because each district manager was responsible for a large number of carriers, the degree of supervision over the means and method of distribution utilized by the carriers was limited.[36]

The result reached in *Oakland Press* was also reached upon very similar facts in *Virginian-Pilot/Ledger Star* where Board Member Truesdale again dissented from the majority's holding that the newspaper carriers involved were employees of the publisher and that the district managers were therefore supervisors.[37]

From a publisher's point of view, therefore, the conversion from independent contractor distribution to employee distribution may have dual advantages:

1. Legalizing the setting and maintenance of maximum retail prices; and
2. The removal of district managers (or other persons who supervise the carriers) from the coverage of the National Labor Relations Act.

However, the conversion from independent contractor to em-

36. 249 N.L.R.B. at 1084.

37. In earlier cases, the Board appears to have given much greater weight to the prior position taken by the publisher in respect to the status of its carriers. Thus, in Newsday, Inc., 171 N.L.R.B. 1456 (1968), the Pressmen's Union sought to represent a unit of some 260 district circulation managers. The publisher contended the district managers were "supervisors" within the meaning of the NLRA because they supervised the publisher's carrier newsboys; and that consequently a unit of district managers was inappropriate. The arrangement between Newsday and its newsboys was virtually identical to that which existed in *Oakland Press* and *Virginian Pilot/Ledger Star*. Yet, the Board held that the Newsday carriers were independent contractors, not employees, and that the district circulation managers were therefore nonsupervisory employees covered by the Act. In reaching this result, the Board emphasized that the publisher had "always considered the carriers to be independent contractors." *See also* Philadelphia Newspapers, Inc., 238 N.L.R.B. 835, 837 (1978), where the Board, in finding that youth news carriers were employees (and, hence, that the district managers who directed their activities were "supervisors") considered it "significant" that "in this case, we cannot find that the Employer, prior to having a case before the Board, has always conceded or held out that its carriers were independent contractors."

ployee distribution has at least one major disadvantage from an employer's standpoint—it brings the employee-carriers under the coverage of the National Labor Relations Act and subjects them to possible unionization.[38]

Some publishers have sought to restructure their distribution system to lawfully control retail pricing while, at the same time, avoiding conversion to employee distribution of the newspaper. This has been accomplished by eliminating wholesale sales to independent distributors, engaging in direct sales to the subscriber and utilizing "independent delivery agents" rather than employees for delivery of the newspaper to the subscriber.[39] Under this arrangement, however, district managers or other supervisors of the delivery agents, would be covered by the National Labor Relations Act and subject to unionization, assuming the independent delivery agents are found to be bona fide independent contractors.

III
Independent Contractors in the Media: What Can Unions Do?

In the highly competitive field of communications, an issue which has major significance for both labor and management is how to approach and attempt to resolve the expanding use of so-called freelancers or independent contractors. From an employer's standpoint, the use of freelancers makes it possible to ignore basic labor statutes and contract provisions. From a union's perspective, "employee" status is necessary to provide workers with the full array of protections granted by Congress and state legislatures, and is essential in these difficult economic times to halt an erosion of jurisdiction. Because of these competing interests, the issue of whether an individual is an "employee" within the meaning of the National Labor Relations Act has been hotly contested by both groups.

---

38. The employee status of newspaper carriers, where such status is found to exist, also brings the carriers under the coverage of other labor legislation such as Title VII of the 1964 Civil Rights Act. *But cf.* section 13(d) of the Fair Labor Standards Act which exempts from the minimum wage, equal pay, overtime and child labor provisions of the statute "any employee engaged in the delivery of newspapers to the consumer."

39. *See, e.g.*, Harden v. Houston Chronicle Publishing Company, 434 F. Supp. 54 (S.D. Tex. 1977); Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977); Paschall v. The Kansas City Star Co., 441 F. Supp. 349 (W.D. Mo. 1977).

Before examining the Board's treatment of this issue in communications labor law, a brief review of the origin of this problem will be helpful. Originally, the Wagner Act[40] did not exclude "independent contractors" from its jurisdiction. The impetus for the 1947 amendment came from the Supreme Court's holding in *NLRB v. Hearst Publications*.[41] There, full-time dealers who sold papers at established locations organized and won an election, but when the union sought to bargain, the employers refused. The Board's finding of a section 8(a)(5) violation was ultimately presented to the Court and focused on whether the Act was even applicable to these workers. The Court held that the "right to control" test was not the proper yardstick in determining the scope of the statute.

Under this test, an employer-employee relationship will be found to exist when the employer reserves the right to control not only the result to be achieved but also the means to be used in attaining that result. To establish an independent contractor relationship, the employer may reserve only the right to control the ends to be achieved and must relinquish control over the means to be used. "[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles."[42]

In rejecting the test, the Court held that as a matter of economic fact these individuals were subject to the evils the statute was designed to eradicate; they depended upon the company for their wages and other benefits and might need a union to permit them to deal with the employer on an equal footing. In short, the Court said that employee status must be measured by the purpose of the legislation and the economic relationship of the parties.[43] Under the new test of purpose and economic relationship, these dealers were employees.

Adverse reaction to this decision eventually led Congress to amend the statute to exclude from the definition of employee any individual having the status of an independent contractor. As the Supreme Court recognized in *NLRB v. United Insur-*

40. 29 U.S.C. §§ 151-187 (1976).

41. 322 U.S. 111 (1944).

42. NLRB v. United Ins. Co., 390 U.S. 254 (1968).

43. 322 U.S. at 129.

ance Company,[44] this amendment reflected the Congressional intent of having both the Board and the judiciary apply general agency principles to distinguish covered employees from excluded independent contractors. The Court also formally placed its imprimatur upon the Board's use of the common law "right to control" test.

Though the Board has often been accused of issuing inconsistent decisions in this factually complex legal field, perhaps no court has more strongly criticized the Board for its decisionmaking than the Court of Appeals for the District of Columbia Circuit in *Seafarers* by stating: "Such erratic decisionmaking is unacceptable—particularly as to *issues* of law."[45]

While *Seafarers* focused upon the independent contractor status of lessee cab drivers and thus falls outside the purview of this article, the court's repeated and heated criticism of the Board's approach to this case is noteworthy—and is somewhat applicable to the field of media labor relations. The court in *Seafarers* took note of the fact that for years the Board had waffled on the employee status of taxi drivers. Specifically, the court chastised the Board as follows:

> [W]hen an agency on a particular legal issue, without giving any *reasoned* decision for changing, arrives at three different interpretations within a few years, where there has not been any demonstrated change in decisional law, statute, or circumstances to justify changing the law, then a court is justified in examining more closely the basis for the unexplained shift in the Board's decisions.[46]

The court concluded that the Board's reliance on certain manifestations of employee status was wholly insufficient to support a finding that the drivers were employees within the meaning of the Act.[47]

Undaunted by the court's attack, the Board has remained firm about its decisions in this "difficult area of the law."[48] In *Air Transit, Inc.* the Board stated:

> We are of the view that any apparent inconsistency stems from the fact that: "There are innumerable situations which arise in the common law where it is difficult to say whether a particular

---

44. 390 U.S. 254 (1968).

45. Local 777, Seafarers Int'l Union v. NLRB, 603 F.2d 862, *rehearing denied*, 603 F.2d 891, 894 (D.C. Cir. 1979) [hereinafter *Seafarers*] (emphasis in original).

46. *Id.* at 893 (emphasis in original).

47. *Id.* at 904.

48. *See* Air Transit, Inc., 248 N.L.R.B. 1302, 1310 (1980).

> individual is an employee or an independent contractor, and these cases present such a situation."[49]

In that case, the Board reversed the finding of the Regional Director for Region Five that taxicab drivers at the employer's Dulles Airport facility were independent contractors. The Board made the following points which bear upon its examination of any employee-independent contractor question:

> The Board made it clear that the permanency of the relationship is an important factor to be considered, overruling any prior cases which suggested a contrary rule.
>
> In *Seafarers*, the court had observed that the employer's unilateral right to revise terms and conditions of employment does not demonstrate control over the manner and means in which taxi service is provided. The Board respectfully disagreed, noting that "the right to promulgate and make unilateral changes in terms and conditions evidence a *right to control* the manner and means in which services are to be provided as well as the absence of an arm's length relationship between two contracting parties." Thus, the Board found that although there were no set hours of work for the drivers, the employer retained the right to impose a work schedule—a right which evidenced a master-servant relationship.
>
> The Board emphasized that it is the right to control, not the actual exercise of that right, which is the key factor in evaluating employee status.[50]

The Board concluded that, on balance, the taxi drivers were employees who could be organized.[51]

IV
The Expanding Use of "Freelancers"— The Right to Control Test

A. NLRB Decisions

Over the years, the Board has identified certain key factors

---

49. *Id.* (quoting *United Ins.*, 390 U.S. at 258).

50. The statements represent the author's own thoughts, citing 248 N.L.R.B. at 1308.

51. Member Penello dissented, citing the "scholarly opinions" in *Seafarers* and hoping that "my colleagues would reconsider finding individuals to be employees in circumstances similar to those presented in [*Seafarers*]." 248 N.L.R.B. at 1310. Penello found that the independent entrepreneurial character of the taxi drivers included "virtually unfettered discretion" in deciding upon the manner in which their services would be performed. 248 N.L.R.B. at 1312. "The tenuous nature of the majority position [is] aptly characterized by the court of appeals in [*Seafarers*] as 'straining at gnats . . . .'" 248 N.L.R.B. at 1314.

to consider in deciding whether an employer has retained the right to control the manner and means of performing certain work. Throughout these cases, the Board has attempted to emphasize that it is the right to control which is of paramount importance, not whether the control is actually exercised. This section will examine the various factors set out by the Board.

1. *Whether the Work is Essential to the Employer's Operations*

The first factor to consider is whether the work is essential to the employer's operations. In *Boston After Dark, Inc.*[52] the United Electrical, Radio and Machine Workers petitioned for an election of a "unit" of workers who produce and distribute the weekly *Boston Phoenix*. The employer sought to exclude all "freelance" writers, cartoonists and photographers on the ground that they were independent contractors. In the past, the employer had relied heavily upon these individuals to contribute to various sections of the paper.[53] The record established that for a four and one-half month period in early 1973, eighty-five freelancers had contributed 600 pieces to the nineteen weekly issues, but the union claimed to represent only the thirty-nine freelancers who had contributed six or more articles, cartoons or photographs. As to these individuals, the union contended that the regularity of their contributions to the paper and the company's reliance thereon established a community of interest with other unit employees.

The Board disagreed and noted that all of the freelancers were paid on a piece-rate basis and that none were covered by the company's fringe benefit package. A number of the freelancers actively participated in weekly Monday meetings in which stories for the paper were assigned, spent a considerable amount of time at the paper's offices and had their submissions edited by the paper. However, these considerations did not demonstrate that the paper retained a right to control the manner in which this work was performed. The Board found that none possessed the necessary indicia of employee status because these persons were more like small business people

52. 210 N.L.R.B. 38 (1974).

53. The art section, for example, was comprised almost exclusively of such material.

who could also write for other papers, including competitors of the weekly.

NLRB Member Fanning dissented on the ground that the Board's decision reflected a complete reversal of its key finding in *Plainfield Courier-News Co.*[54] In that case, the Newspaper Guild local had represented the employees of the daily paper, but sought to represent eight full-time "space or suburban correspondents" who were paid on a piece rate and who were assigned a certain geographical territory to cover. The Board concluded that these correspondents were employees and thus distinguishable from "stringers," who were part-time workers servicing a number of papers. Member Fanning noted that whereas the Board in *Plainfield* had relied heavily upon the fact that the work of the correspondents was "closely integrated with, and constituted an essential part of, the employer's business,"[55] in *Boston* the Board totally ignored that factor in finding contractor status. Member Fanning would focus upon the number of freelancers who have, "by their own individual contributions, proved themselves so essential an element of the Employer's reportorial effort as to be deemed employees of the Employer rather than independent contractors."[56]

Indeed, in *Seafarers*, the Supreme Court held that the "essentiality" of work to an employer's operation exists frequently, but does not demonstrate whether the workers' arrangement satisfies the right to control test. In the communications field, publishers and broadcasters regularly use "freelancers" to perform certain work which is crucial to their operations, but this fact, at the present time, is not itself conclusive and will not provide unions with much support in protesting this development.

2. *Whether the Freelancer Has Invested in the Tools of the Trade*

A second factor to consider is the extent of the freelancer's investment in the tools of the trade. The greater the freelancer's investment in the tools of his trade, the more likely will be the Board's finding that the individual is an independent contractor. For example, in *Young & Rubicam Interna-*

54. 95 N.L.R.B. 532 (1951).
55. 210 N.L.R.B. at 44.
56. *Id.*

tional, Inc.,[57] an NRLB case involving professional photographers who worked for a New York advertising agency, the Board focused on the photographers' substantial investment in their photographic equipment before finding that the individuals were independent contractors.[58] The Board found that the following factors militated against a finding of employee status:

1. The photographers are highly skilled and talented individuals, each with his or her own specialty.
2. Most of the photographers conduct their activities as New York corporations.
3. The agency pays sales taxes on the fees it pays to the photographers and does not withhold any taxes or provide fringe benefits.
4. Each photographer rents a well-equipped studio in which he performs his work, including expensive and sophisticated equipment.
5. All but one of the photographers employ at least one employee as well as an agent.
6. The photographers advertise for work.
7. Each earns a flat fee for their work for the agency, with some expenses reimbursed by the company.
8. The photographers may accept or reject a request to bid for or perform an assignment.[59]

3. *Whether the Freelancer Has Made Extensive Use of the Employer's Work Place*

A third factor to consider is the extent of the "freelancer's" use of the employer's work place. Extensive use of the employer's work place enhances the likelihood of the Board finding a freelancer to be an employee. However, a freelancer's limited use of the employer's work place does not necessarily preclude a finding of independent contractor status. For instance, in *Bulletin Co.*,[60] the union sought to represent fourteen stringers, most of whom phoned in police or accident reports (or called the paper to determine whether an editor was interested in a story idea). Additionally, a stringer could refuse an assignment without jeopardizing chances for future work. The stringers are given a byline which distinguishes

57. 226 N.L.R.B. 1271 (1976).
58. *Id.* at 1275.
59. *Id.* at 1273-1275.
60. 226 N.L.R.B. 345 (1976).

their work from that of the regular staff, use the paper's bureau offices only to transmit their stories and contribute stories to other papers as well. The Board concluded that the correspondents were not employees.[61]

4. *Whether the Employer Supervises and Directs the Freelancer*

In *Young & Rubicam*, the Board rejected the union's contention that the close supervision of the photographer by the agency art director demonstrated the agency's right to control the photographer's work. The Board noted that the art director did give instructions to the photographer, but held that this was merely a manifestation of the essential character of the work, not a control over the individual's professional skill.

> [W]hat the employer is contracting for is a photograph which will faithfully express the creative idea embodied in the layout, and the type of instructions given to a photographer by an art director properly relate to this end rather than to the technical means by which that goal is achieved.[62]

In contrast, photographers were considered to be employees in *News-Journal*.[63] There, the employer contended that two of its seven photographers were independent contractors. The individuals were (1) guaranteed a minimum number of assignments per week and paid a fixed sum for each assignment; (2) able to refuse an assignment; (3) compensated for transportation and living expenses for assignments performed outside a designated area; and (4) worked under contracts which were terminable without cause. The Board concluded that these two photographers "bear slight resemblance" to independent businessmen, specifically because of the guarantee of assignments.

> Although they have discretion to determine the manner in which assignments are to be performed, this factor carries little weight here because it appears that such discretion is in the nature of a photographer's job. The facts that the Employer exercises control over Fleming and Crawford's assignments, that Fleming and Crawford use the Employer's darkroom at no expense to develop their film, and that the contract is short term and can be terminated virtually at will are clear indica-

61. *Id.* at 362.
62. 226 N.L.R.B. at 1275.
63. 227 N.L.R.B. 568 (1976).

tions of an employment relationship.[64]

In short, the Board found that professional photographers who operate like "small entrepreneurs" satisfy the statutory exclusion, but where essential business features were missing, employee status could be found.

5. *The Compensation Scheme*

The Board also considers the compensation scheme. Where a freelancer is paid on a piece-rate basis, the Board regularly concludes that the individual is an independent contractor.[65] *La Prensa Inc.*[66] illustrates the significance of the compensation arrangement. There, the Board was confronted with a photographer who was converted from employee to independent contractor status. The employee, Carrion, was hired by the paper in April 1958 under a salary and expense program. The paper built a darkroom on its premises for the employee's use, but the employee furnished almost all photographic equipment and supplies needed for his work. The employee paid a helper at his expense to assist in developing prints. Carrion was given regular assignments and the editorial staff reviewed his work product. In December 1958, the employer removed the employee from the payroll, cancelled the salary and expense arrangement, and thereafter paid him $3 for each photograph used in the publication. In December 1959, the employer terminated this arrangement.[67]

The Board reversed the section 8(a)(3) finding of its Trial Examiner and concluded that Carrion was an independent contractor:

> The most important fact supporting this relationship was his method of compensation. He used his own photographic . . . supplies. His only payment was $3 for each picture accepted for publication. If a picture was not accepted, Carrion stood the loss. In addition, Carrion could sell copies of his pictures

64. *Id.* at 571.

65. Bulletin Co., 226 N.L.R.B. 345 (1976) (freelancer paid on a per story basis); La Prensa, 131 N.L.R.B. 527 (1961) (photographer paid for each picture that is accepted); Philadelphia Daily News, Inc., 113 N.L.R.B. 91 (1955) (cartoonist paid on a fee-per-cartoon basis).

66. 131 N.L.R.B. 527 (1961).

67. The record established that when Carrion's name was removed from the payroll, the union had filed a grievance, claiming that unit work had to be performed by employees covered by the contract. The arbitrator denied the grievance on the ground that the evidence showed that the parties intended to exclude Carrion from the coverage of the agreement.

> which appeared in Respondent's newspaper to any customer other than a newspaper competitor and received the entire proceeds of such sales. Also, although Respondent assigned Carrion to subjects which were to be photographed, it does not appear that it controlled the manner or means by which he was to perform his work. Carrion functioned substantially like, and received the same pay as, other photographers who were admittedly freelancers, except that he received more assignments, apparently because he had a darkroom on the premises.[68]

6. *Whether the Employer Guarantees Assignments*

If an employer guarantees assignments, and thus, a certain level of income, employee status will be found. In *News-Journal*,[69] the employer sought to exclude a columnist from the collective bargaining unit on the ground that he was an independent contractor. The record showed that the columnist was a retiree of the paper who continued to submit columns pursuant to a contract with the paper. In return, the paper agreed to pay him the difference between a normal salary and his retirement benefits. However, aside from the compensation structure, his job involved many of the characteristics of employee status. He wrote a daily column, prepared other articles and was assigned the prison beat. Further, like other reporters, he accepted assignments from the news department. As a consequence, the Board found that the columnist was an employee within the meaning of the Act. In his dissent, NLRB Member Penello suggested that the columnist was an independent contractor, but stated that the record was insufficient to warrant any finding at that time and that the columnist should vote in union elections subject to challenge.

7. *Whether the Freelancer Receives Fringe Benefits*

Furthermore, fringe benefits can demonstrate employee status. In *Quebecor Group, Inc.*,[70] the issue of the employee status of sports handicapping columnist "Diamond Don" was determinative of whether threats of discharge and an actual termination violated section 8(a)(1) and (3) of the Act. The facts showed that Diamond Don (Don Leventhal) had previ-

68. 131 N.L.R.B. at 531.
69. 227 N.L.R.B. 568 (1976).
70. 258 N.L.R.B. 125 (1981).

ously served as day copyboy, but in June 1980 took another job outside of the paper while he continued to submit his daily sports handicapper column. He was paid a salary as copyboy but earned a piece rate for each column. He also was one of the leaders of the Guild's organizing drive. During the representation hearing, the company's business manager indicated that he was going to recommend that Leventhal lose one of his jobs. When Leventhal heard about this comment, he asked the managing editor about it, only to be told that "because of the [expletive deleted] Guild, you are going to lose your job." A few weeks later, the editor elaborated on his previous warning and stated that if the union won the election, it would dictate a higher salary than that which he was being paid and that the paper would obtain a syndicated handicapper who would be cheaper. During the next months, Leventhal was the subject of other threats—all of which resulted in section 8(a)(1) violations. Finally, after the Guild was certified, Leventhal was notified that the "Diamond Don" feature was being discontinued. The administrative law judge concluded that the cost-cutting rationale offered by the paper was purely pretextual. He found that the sequence of events and the threats to Leventhal belied any legitimacy to the company's claim.

In its exceptions, the company took the position that Leventhal's termination did not contravene the Act because he was an independent contractor. The Board noted that Leventhal received a regular compensation, was frequently present at the office and contributed to the paper on a regular basis. Most important, there was evidence that Leventhal continued to be covered under the company's fringe benefit program—"a significant factor distinguishing an employee from an independent contract." As a result, the Board affirmed the administrative judge's finding.

8. *Whether the Freelancer Can Refrain from Performing Services*

If a "freelancer" can refrain from performing services without affecting his or her opportunity to perform in the future, the Board will find independent contractor status.[71] For exam-

71. *See* Boston After Dark, 210 N.L.R.B. 38 (1974), where the Board found "one crucial element": the ability of these freelancers to refrain from contributing material without prejudicing their chances of being a contributor in the future.

ple, in *Century Broadcasting Corporation*,[72] the Board reversed a regional director's finding that certain freelance announcers were employees of the employer's Chicago radio station, WFMF[73] and concluded that all of the announcers were independent contractors. The Board based its decision on the lack of supervision during taping sessions, the right of an announcer to accept or reject assignments and the absence of any restriction on the announcers doing outside work. While the conduct of the employer in auditioning the announcers and its right to terminate their services might suggest a master-servant relationship, the Board found that these elements merely indicate "that the Employer retains control over the ultimate result to be accomplished; i.e., to broadcast its commercial and other announcements."[74]

The Board has been inconsistent as to whether a long-term contract or a short-term contract indicates employee status. Originally, the Board found that a short-term agreement, terminable at will, indicated employer status.[75] Courts, however, took exception to that view, asserting that permanence, not temporariness, showed employer status.[76] Finally, in *Air Transit*, the Board adopted the view of the District of Columbia Circuit[77] that long-term agreements tend to indicate employee status and that where an individual appears to be a businessperson, rather than a mere worker, independent contractor status should be given to the individual. Nonetheless, predictions are difficult in this arena. For example, the cases of *El Mundo, Inc.*,[78] and *Film and Dubbing Productions, Inc.*,[79] il-

72. 198 N.L.R.B. 923 (1972).

73. The station employed a regular clerical and engineering staff, but utilized the services of 11 freelance announcers for broadcasting (usually taped) commercials, station identifications and headlines. The general manager of the station auditioned various individuals for this role, negotiated a session fee arrangement, and placed the announcer's name on a list. Each week the station's traffic employee called announcers on the list to arrange taping sessions, and each announcer was free to accept or reject the work. Even if the announcer agreed to tape for the station and subsequently located more lucrative work, he was free to obtain a substitute from the list at his own cost. At the taping sessions, the station provided each announcer with a copybook, but no supervision or direction was provided during the actual recording. The announcers were compensated bimonthly like other station personnel, but were not carried on the payroll. All did extensive freelance work at other radio and television stations or ad agencies.

74. 198 N.L.R.B. at 924.

75. *See* News-Journal, 227 N.L.R.B. 568 (1976).

76. *See Seafarers*, 603 F.2d 862 (D.C. Cir. 1979).

77. *See* Air Transit, Inc., 248 N.L.R.B. 1302 (1980).

78. 127 N.L.R.B. 538 (1960).

lustrate the District of Columbia Circuit's complaint about inconsistent Board decisions. In *El Mundo*, the Board was asked to determine the status of certain individuals employed as "translators" to translate film dialogues. The translators were paid a fixed fee per picture, plus a bonus if the work was completed within a shorter time than scheduled. The work was performed at the individuals' homes without any direction from station personnel. The Board held that all translators satisfied the definition of independent contractors and were to be excluded from the unit.

By 1969 El Mundo, Inc. had been taken over by a successor corporation and the composition of the National Labor Relations Board had changed. In that year, the same petitioner sought an election in a separate unit of these translators but this time the Board found that the translators were "employees" within the meaning of the Act.

In *Film & Dubbing*, the evidence in the record appeared to be more complete than that presented during the *El Mundo* hearing, but the essential features of the translating job remained unchanged.[80] Nevertheless, the Board held that the right to control test was satisfied by the fact that (1) the work was a necessary and continuous part of the employer's business, (2) each translator had a day scheduled each week for submission of his or her film, (3) the employer determined the qualifications of and tests prospective translators, (4) the fees were not subject to negotiation, and (5) while the translators worked at home, they did use the employer's premises for initial viewing of the film and later verification of their work. When confronted with the claim that the Board had previously found these translators to be independent contractors, the Board merely stated that it "is not thereby precluded from again considering the status of these individuals as it may appear from the present record."

B. Jurisdictional Problems Involving Alleged Independent Contractors

The grievance process has addressed, and will increasingly address, the independent contractor issue as the media vies for the customer's or listener's attention in this highly competitive

79. 181 N.L.R.B. 583 (1970).

80. Actually, the only real change may have been the composition of the National Labor Relations Board.

field. For the print media especially, the financial difficulty of various papers and the need to compete with a growing number of suburban publications have provided the motive for a more frequent use of so-called freelancers than ever before. The use of such "reporters" arguably permits a paper to provide a broader and more complete coverage of local affairs, but causes unions concern as they find their jurisdiction slowly eroding. These conflicting goals have resulted in a number of unusual arbitration awards. As a whole, the awards demonstrate that strong contract language and the past practice of the parties will be the key ingredients in the resolution of these disputes. A few of these awards will be examined.

A past practice of having non-unit employees perform what otherwise would be unit work played the pivotal role in *Elizabeth Daily Journal*.[81] The facts established that the *Daily Journal* had its greatest circulation in Elizabeth, New Jersey, but was also sold in Westfield, a suburban community about eleven miles away. During 1966 and 1967, the paper had hired Gail Trimble as a space correspondent to obtain both hard news and features in the Westfield area. In early 1967 Trimble became a full-time reporter for the paper, but later that year became an editor of a Westfield local paper. At that time, Trimble returned to her status as an independent contractor for the *Elizabeth Daily Journal*. In 1969 the union entered into a contract which provided that it shall have jurisdiction over the work either normally or presently performed within the departments covered by this contract.

The central theme of the union grievance was that reporting hard news was a function of the reportorial staff, and that the work Trimble performed therefore was unit work. The basic difference between reporters and correspondents was that reporters were assigned stories to cover while space correspondents generally acted on their own initiative in the hope that the piece would be purchased by a paper.

The union conceded that in the past municipal council and school board meetings—such as those covered by Trimble—had been covered by space correspondents, but argued that normally such work was performed by staff reporters. Because of the past practice of non-unit correspondents producing unit work, the arbitrator found that the jurisdiction preservation

81. American Arbitration Association, No. 1330 068 69 (1970) (unpublished).

clause in the contract did not preclude Trimble's continued employment as an independent contractor. The arbitrator emphasized that past practice included a variety of situations in which non-unit correspondents performed unit work and observed that there was no claim that the number of unit employees had been reduced as a result of Trimble's employment.

A union effort to restrict the effect of its past practice was held insufficient to preclude assigning of unit work to non-unit personnel in *Journal Tribune Publishing Co.*[82] There, the paper had in the past used a unit employee to distribute newspapers both to South Sioux City, Nebraska and to a part of downtown Sioux City. Because the paper was having carrier and customer troubles in South Sioux City, it split these two districts and assigned just the South Sioux City distribution to one independent contractor who, in the company's view, would have more time to devote to these problems. The union disagreed with this decision and contended that any additional manpower should be acquired as part of the collective bargaining unit, that the company's motive was simply to avoid the financial obligations of the union agreement and that there was no material difference between the work of this independent contractor and that of district managers who were part of the unit. The union explained that any other unit work which was subcontracted preceding the recent negotiations was allowable, but that this new subcontracting following the negotiations violated a contract clause:

> The publisher agrees that the kind of work normally or presently performed by employees covered by this contract or work similar in skill or function, shall continue to be performed by employees covered by this contract regardless of the processes or equipment used.[83]

On the other hand, the company argued that it had a management right to subcontract unit work. With respect to the contract clause, management argued that the provision was sought solely as a means of curtailing jurisdictional conflicts with another union and not as a means of preventing subcontracting. Moreover, the past practice of employing independent contractors both in the circulation and editorial departments supported its right to do so in this instance. The company argued that the particular individual met the test of

82. American Arbitration Association, No. 513 0001 1971 (1971) (unpublished).
83. *Id.*

independent contractor status and that no bargaining unit employees were injured by its conduct.

In the arbitrator's view, the union's claims fell wide of the mark. Primarily, the bargaining history failed to solidly support the union's claim that the contract provision was the product of an effort to prevent further subcontracting. Furthermore, no employee suffered a job loss, the company realized efficiency of operations, the industry practice supported the company's position and the law considered the individual as an independent contractor. The arbitrator found the union claim of an erosion of the unit to be pure speculation and discovered no loss of overtime.

> The Union argues the Company should have met the competition and the increased job responsibilities by adding another bargaining unit employee. The arbitrator agrees that the Company could have elected to do so but they are not obliged to do so. They had another option and chose to take it. Whether one alternative is better than the other is not the question—the question is could they take the course of action they so chose? Clearly they can.[84]

These cases typify the classic tension which exists between management and labor when independent contractors are used to perform work which the union believes falls within its jurisdiction. While the arbitrator concluded in *Journal Tribune* that the union's claim of unit erosion was speculative, the contract language itself underscored the company's promise that work performed at the time of the execution of the agreement must continue to be performed by unit employees. In the end, however, the case turned on the absence of sufficient evidence that the union had specifically sought that provision as a weapon against continued or increased subcontracting. Such bargaining history, from both parties' perspective, will become even more significant as employers expand the use of independent contractors.

V
Conclusion

The treatment of the independent contractor issue by both the Board and arbitrators produces a very bleak outlook for unions. Labor organizations will, as they must, continue to chal-

84. *Id.*

lenge the expanding use of non-employees, but the present body of law will not provide much support. Moreover, the current economic conditions may themselves militate against a forceful push as unions and their members press more vigorously for job security and benefits in an effort to avoid large scale layoffs. The practicalities of the current situation may make organizations of freelancers a major goal in this struggle. Unions must keep a watchful eye on this issue to avoid a slow and deliberate erosion of contractual or historic jurisdiction.